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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

EMPLOYERS INSURANCE OF WAUSAU,
A Mutual Company,

Petitioner,

v.

CAROL M. BROWNER, Administrator of the United States Environmental Protection Agency, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

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STATUTES

Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), 42 U.S.C. § 9601 *et seq.*, hereinafter referred to as:

CERCLA § 106 ..... 6, 7

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CERCLA § 106(b)(2)(A) 2

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PETITIONER'S REPLY BRIEF

I.

THE SEVENTH CIRCUIT'S RULING ON FEDERAL JURISDICTION IS IN CONFLICT WITH THE EIGHTH CIRCUIT'S RULING AND PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW FOR THIS COURT'S REVIEW.

A. Rather than address the question of federal jurisdiction, Respondents chose instead to argue the propriety of the limited, albeit deferential, review performed by the two courts below. Yet, any such discussion is premature and irrelevant, at least until the question of federal jurisdiction is resolved. The proper question requiring this

Court's review is: In reimbursement actions, did Congress provide federal jurisdiction pursuant to CERCLA § 106(b)(2)(A) as held by the Seventh Circuit Court of Appeals below? Pet. App. 8. Or, did Congress provide federal jurisdiction pursuant to CERCLA § 106(b)(2)(B), and create only a pre-litigation, administrative opportunity to resolve reimbursement issues under CERCLA § 106(b)(2)(A)? See *Dico v. Diamond*, 35 F.3d 348, 352 (8th Cir. 1994). Unquestionably, the Seventh Circuit "rendered" its decision in direct conflict with the decision of the Eighth Circuit in *Dico*. See Rule 10.1(a).[1]

The Eighth Circuit did not *hold* that the Agency's interpretation of the relevant statute was not entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See Resp. Br. 12. Rather, in *Dico*, the Eighth Circuit *concluded that it did not have to decide that issue,* because as a matter of fact, Dico had "received and complied" with the order after the effective date of the reimbursement provisions.[2] *Dico*, 35 F.3d at 353.

Finally, the Circuit Court below is *not* "the first to address a challenge to an EPA determination of noncom-

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[1] Respondents concede that there is a conflict between the courts below. Resp. Br. 11 n.10. That conflict highlights "an important question of federal law which has not been, but should be, settled by this Court." See Rule 10.1(c).

[2] Also, citing *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990), the Eighth Circuit *held* that the *relevant* reimbursement provisions of the statute are administered only by the courts, and *not* by the Agency and that the Agency's "interpretation" was not an interpretation but a substantive determination not appropriate for deference. *Dico*, 35 F.3d at 351, 352 n.4 ("We fail to discern a difference between issues of qualification and issues of liability").

pliance with a CERCLA Section 106 order." Resp. Br. 13. But even if it were, the point still begs the question: What is the source of federal jurisdiction?

The Eighth Circuit in *Dico* reviewed the specific CERCLA § 106(a) *order* and *held* that the Agency's substantive determination of "non-compliance" with the specific CERCLA § 106(a) *order* was wrong.

> Assuming *arguendo* that EPA is correct that a party seeking reimbursement must have both "received and complied" with an *order* subsequent to SARA's effective date to qualify for the benefits of this provision, *we believe Dico meets this standard*. It is undisputed that *the order* issued to Dico thrice was modified after the date the reimbursement provision became law. Moreover, the cumulative effect of the modifications made the *resulting order* considerably different from EPA's *original order*, and the cleanup work was not commenced until the EPA made its final modifications to *the order*. In these circumstances, we conclude that *the order* was not final for purposes of interpretation of the "receives and complies" language until the last modification was made. This means that Dico did not "receive," and was unable to "comply" with *the order* until . . . after the reimbursement provision was effective.

Dico, 35 F.3d at 353 (internal citations omitted; some emphasis added).

The holding in *Dico* was not resolved merely by statutory construction. See Resp. Br. 12, 13. Also, the Eighth Circuit's decision in *Dico*, like the Seventh Circuit's decision below, addressed a challenge to the Agency's determination of compliance (referred to as "noncompliance" by Respondents) with a CERCLA § 106(a) unilateral administrative order. And, like *Dico*, the Seventh Circuit

concluded that deference to the Agency's statutory construction was unnecessary, if not improper.[3] However, the key question is: Where do federal courts find jurisdiction to make their respective conclusions?

Moreover, the decision below is simply another case in a long line of cases struggling with the reimbursement provisions. In addition to the two courts below, and the *Dico* opinions in the Eighth Circuit cited in the Petition, *see also*, *Wagner Seed Co. v. Bush*, 946 F.2d 918 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1584 (1992), explained in *Kelley v. EPA*, 15 F.3d 1100 (D.C. Cir. 1994), *reh'g denied*, 25 F.3d 1088 (D.C. Cir. 1994), *cert. denied sub nom. American Banker's Association v. Kelley*, 115 S. Ct. 900 (1995); *Bethlehem Steel Corp. v. Bush*, 918 F.2d 1323 (7th Cir. 1990); *Gary Steel Supply Co. v. Reagan*, 711 F. Supp. 471 (N.D. Ill. 1989). Furthermore, the reimbursement provisions were added in response to significant, still relevant, concerns articulated by other courts. *See*, e.g., *Wagner Electric v. Thomas*, 612 F. Supp. 736 (D. Kan. 1985); *Aminoil, Inc. v. EPA*, 599 F. Supp. 69 (C.D. Calif. 1984); *U.S. v. Reilly Tar and Chemical Corporation*, 606 F. Supp. 412 (D. Minn. 1985). All of the post-SARA cases "addressed" challenges "to an EPA determination of noncompliance with a CERCLA Section 106 order." Only this Court can resolve the split of authority in the circuits and the important questions of federal law involving the reimbursement provisions. See Rule 10.1.

B. Respondents also fail to address the relevant policy considerations at issue. Notwithstanding CERCLA's goal of encouraging prompt environmental cleanups, does the

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[3] See *Dico*, 35 F.3d at 352; Pet. App. 15, 16.

Agency have power under the statute, and authority under the Constitution, to order a citizen to perform acts which, no one denies, the Agency could not compel in court *under the very same statute*? Moreover, how does the Seventh Circuit's rule encourage prompt cleanups, providing, as it does, that a *potentially* responsible party can choose complete *defiance* to the all-too-familiar overly broad order?

C. Furthermore, as to Respondents' repeated references that no one has determined Petitioner's liability, Petitioner again denies all liability under the statute for any and all alleged, and unproven, hazardous substances at the Site.[4] Specifically, Petitioner denies Respondents' wholly unsupported statement that: "Pursuant to the [insurance] policy, petitioner agreed to have removed from the property certain debris, including fluids and oils contained in several electrical transformers." Resp. Br. 5. *There is absolutely no evidence in the record that supports the contention that Petitioner "agreed to remove" any material.*

To the contrary, in the only case where the Agency *attempted* to prove that proposition, Chief Administrative Law Judge Jon G. Lotis *dismissed* that claim against Petitioner as meritless. See *In the Matter of Employers Insurance Company of Wausau, et al.*, Docket No. TSCA-V-C-62-90, Initial Decision, Slip Op. at 3, 18-19 (EPA Sept. 29, 1995) ("Wausau did not engage in the disposal of the transformers. Accordingly, the charge against it is

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[4] Obviously, the Agency "determined" Petitioner's unproven liability. If it did not, then the CERCLA § 106(a) unilateral administrative order was, on its face, unenforceable, arbitrary, capricious and unlawful. See CERCLA § 106(a).

dismissed"; "Wausau was obligated *to pay* only for the removal of fire damaged property covered under the contract. And, independent of that contract, Wausau took no action affecting the draining and removal of the [PCB-containing] Niagara transformer") (emphasis added).

II.

THE SEVENTH CIRCUIT'S RULING AS TO THE SCOPE OF CERCLA LIABILITY CONFLICTS WITH DECISIONS OF THE SECOND, THIRD AND FIFTH CIRCUITS.

Again, rather than address the Seventh Circuit's holding concerning the scope of CERCLA liability, Respondents avoid the issue by asserting that the Agency (and thus the Court) never "considered petitioner's liability under" CERCLA. Resp. Br. 13. Although conceding that a CERCLA § 106 order is an "enforcement" mechanism, Respondents contend that the order issued to Petitioner "did not purport to impose or apportion liability." Resp. Br. I, 14. The order itself, however, set forth the Agency's "determinations," charging therein that Petitioner had "arranged for disposal or transport for disposal of hazardous substances at the CIW Site" and thus was a "liable person[ ] under Section 107(a)." See also the Agency's unilateral "findings" that allegedly supported these "determinations."[5] C.A. Consol. App. B at 2-6. Unquestionably, Respondents recognize that the liability the

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[5] CERCLA § 106(b)(2) confirms that the Agency necessarily makes liability determinations in issuing CERCLA § 106 orders. That provision presumes the liability of a party seeking reimbursement, based on the Agency's administrative determination, and places the burden on such a party to "establish . . . that it is not liable . . . under section 107(a)." CERCLA § 106(b)(2)(C).

Agency unilaterally imposed was, in fact, joint and several:

> E A insisted that both the order and the [work plan] *required* petitioner to clean up *all hazardous substances* located at the site, *whether or not they were contaminated by PCBs.*

Resp. Br. 6 (emphasis added).

The Seventh Circuit's ruling that the Agency has the authority to unilaterally impose joint and several liability administratively, in a case where the harm at issue is clearly and easily divisible (Pet. App. 4, 54-55 n.13), squarely conflicts with decisions of the Second, Third and Fifth Circuits. *Compare* Pet. App. 12-13 *with In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 901-02 (5th Cir. 1993); *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 722-23 (2d Cir. 1993); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 268-70 (3d Cir. 1992). If this Court follows the Second, Third and Fifth Circuits, Congress need not consider reform legislation to check the Agency's enforcement practices under the statute.

III.

THE SEVENTH CIRCUIT'S REFUSAL TO AFFORD PETITIONER A POST-DEPRIVATION HEARING ON ITS ALLEGED CERCLA LIABILITY DIRECTLY CONFLICTS WITH A RULING IN THE FIRST CIRCUIT.

In dismissing Petitioner's due process claims, the Seventh Circuit relied solely on decisions upholding the constitutionality of *penalties* that *may be imposed* on a party for failure to comply with a CERCLA § 106 order. See Pet. App. 11 (citing *Solid State Circuits, Inc. v. United States Environmental Prot. Agency*, 812 F.2d 383, 389-92

(8th Cir. 1987)); *see also* Resp. Br. 10-11. The deprivation at issue here is critically different than a potential, prospective penalty. In this case, through the Agency's unilateral administrative actions, Petitioner has suffered an *actual* (not speculative) deprivation of its property (i.e., in excess of $2 million). The distinction between *potential penalties* and Petitioner's actual loss was simply ignored by the courts below. By insulating the Agency's administrative determination of Petitioner's disputed liability from review, the Seventh Circuit's decision conflicts with the First Circuit's conclusion that CERCLA's administrative procedures cannot deny a party a timely, *post-deprivation*, judicial hearing on its alleged liability.[6] See *United States v. Reardon*, 947 F.2d 1509, 1523-24 (1st Cir. 1991) (*en banc*).

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[6] Even the Seventh Circuit's authority does not support the Court's conclusion. See *Solid State Circuits*, 812 F.2d at 387, 389 n. 9 (parties can "perform any required clean-up, *with the assurances* that if . . . they are not a responsible party, recovery may be had from the Superfund" pursuant to a "judicial determination of [their] rights and liabilities") (emphasis added).

IV.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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